



March 15, 2002

Ms. Kathleen Finck
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR2002-1275

Dear Ms. Finck:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 159936.

The City of San Antonio (the "city") received a request for the bids submitted in response to a request for proposals to administer the city's self-funded employee insurance plan and related documents, and bids submitted regarding the Prescription Drug Program Contract and related documents. You claim that the requested information is excepted from disclosure under sections 552.104 and 552.110 of the Government Code. Pursuant to section 552.305 of the Government Code, the city notified third parties of the request because their proprietary interests are implicated.¹ As of the date of this ruling, this office has received responses from Aetna and Benefit Planners, Ltd ("BPI") objecting to the release of their proposals. The city did not submit the proposal from Allied Claims Solutions. Therefore, this ruling does not address whether that proposal is subject to disclosure, and we only address the applicability of sections 552.104 and 552.110 in relation to the proposals from Aetna, BPI, Employee Benefit Administrators, Inc. ("EBA"), Group & Pension Administrators, Health Administration Services, Health First TPA, and National Health

¹See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances).

Services.² We have considered the exceptions you claim along with those of the third parties, and have reviewed the submitted information.

Section 552.104 states that information is excepted from required public disclosure if release of the information would give advantage to a competitor or bidder. The purpose of this exception is to protect the interests of a governmental body usually in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Although BPI claims that its information is excepted from disclosure under section 552.104 because release would give advantage to a competitor or bidder, section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *See* Open Records Decision No. 592 at 8-9 (1991). Therefore, we do not consider BPI's claim under section 552.104.

Section 552.104 protects information from public disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). This exception requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. *Open Records Decision No. 541 at 4 (1990)*. Governmental bodies may withhold bid information while governmental officials are in the process of evaluating the proposals and asking competitors to clarify their bids. *Open Records Decision No. 170 (1977)*. Generally, section 552.104 does not except bids from public disclosure after bidding is completed and the contract has been awarded. *See* Open Records Decision 541 (1990). In this case, you inform us that the contract has been awarded. After reviewing your arguments, we conclude that you have failed to demonstrate the applicability of section 552.104 because you have failed to show that the city is involved in a particular competitive situation. We therefore conclude that the city may not withhold the proposals from Aetna, BPI, EBA, Group & Pension Administrators, Health Administration Services, Health First, or National Health Services under section 552.104.

You further argue that the requested bids are excepted from disclosure under section 552.110. Section 552.110 protects the proprietary interests of private parties that submit information to governmental bodies by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information for which it is demonstrated, based on specific factual evidence, that disclosure would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b). Under section 552.110(b), the governmental body or private entity must provide a specific factual or evidentiary showing, and not conclusory or generalized allegations, that substantial competitive injury likely would result from the release of the information at issue. *See* Open Records Decision No. 661 at 5-6 (1999) (addressing required showing); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C.

²We note that you have submitted Humana's information. Humana is the requestor and is entitled to its own information.

Cir. 1974). However, the city has made only conclusory statements in support of its claim that section 552.110(b) operates to except the submitted information. We thus conclude that the city has failed to establish that this information is confidential as commercial or financial information the release of which would cause substantial competitive harm under section 552.110(b).

We now address the arguments submitted by Aetna under section 552.110. Aetna contends that disclosure of its bid information would reveal detailed data allowing competitors to gain an unfair advantage over Aetna. Specifically, Aetna argues that release of the information it provided in response to the questions in the city's request for proposal would allow competitors to obtain detailed information about Aetna's organizational structure, security systems, valuation methodologies, performance evaluation tools, and unique utilization review process. Such information, Aetna claims, constitutes a virtual roadmap to competitors showing how best to compete with Aetna in providing benefits services. However, although Aetna argues that all of its information should be withheld, the city has submitted only a portion of Aetna's information, specifically KPMG's report and accompanying financial statements, and financial information pertaining to COBRA medical and pharmacy coverages. Thus, this ruling only addresses the information submitted on Aetna's behalf. Based on Aetna's arguments and our review of the submitted information, we conclude that Aetna has established that, with the exception of the page we have marked, this information must be withheld under section 552.110(b) as commercial or financial information the disclosure of which would cause substantial competitive harm. As section 552.110(b) is dispositive, we do not address Aetna's arguments under section 552.137.

BPI also submits specific arguments for excepting its information under section 552.110. After reviewing BPI's arguments and the information submitted on behalf of BPI, we conclude that the city must withhold BPI's information under section 552.110(b). As this section is dispositive, we do not address BPI's arguments under section 552.110(a).

We note that the submitted information from Health First TPA contains an e-mail address that is excepted from disclosure under section 552.137 of the Government Code. Section 552.137 provides that "[a]n e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Public Information Act]." *See Gov't Code* § 552.137(a). As there is no indication that the individual to whom the e-mail address belongs has consented to its release, the city must withhold the e-mail address in the Health First TPA information that we have marked under section 552.137 of the Government Code. *See Gov't Code* § 552.137(b) (confidential information described by this section that relates to member of the public may be disclosed if member of public affirmatively consents to its release). Health First TPA's remaining information, and information submitted to the city by EBA, Group & Pension Administrators, Health Administration Services, Health First TPA, and National Health Services must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Kristen Bates
Assistant Attorney General
Open Records Division

KAB/seg

Ref: ID# 158731

Enc. Submitted documents

c: Mr. Jeffrey A. Dean
Manager of Financial Analysis
Humana, Inc.
8431 Fredericksburg Road
San Antonio, Texas 78229-3300
(w/o enclosures)

Mr. Mark R. Chulick
Regional Counsel - Southwest Region
Aetna U.S. Healthcare
P.O. Box 560408
Dallas, Texas 75356-0408
(w/o enclosures)

Mr. J. B. Friedman, Jr.
Fulbright & Jaworski, L.L.P.
300 Convent Street, Suite 2200
San Antonio, Texas 78205
(w/o enclosures)

National Health Services, Inc.
9200 Shelbyville Road, Suite 700
Louisville, Kentucky 40222-8504
(w/o enclosures)

Allied Claims Solutions
7557 Rambler Road, Suite 555
Dallas, Texas 75231
(w/o enclosures)

Health First TPA
P.O. Box 130187
Tyler, Texas 75713
(w/o enclosures)

Health Administration Services, Inc.
100 Glenborough Drive, Suite 450
Houston, Texas 77067
(w/o enclosures)

Group & Pension Administrators, Inc.
300 Municipal Drive
Richardson, Texas 75080
(w/o enclosures)

Employee Benefit Administrators, Inc.
6800 Park Ten Boulevard, Suite 175-West
San Antonio, Texas 78213
(w/o enclosures)